



## INTERIOR BOARD OF INDIAN APPEALS

Estate of Lucy (Grace Medicinebird Lefthand, Bitner, Ridgby,  
White Plume or Geary) Feathers

1 IBIA 336 (12/11/1972)

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# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

ESTATE OF LUCY FEATHERS (GRACE MEDICINEBIRD  
LEFTHAND, BITNER, RIDGBY, WHITE PLUME OR GEARY)  
DECEASED ARAPAHO OF OKLAHOMA

IBIA 72-11

Decided December 11, 1972

Appeal from the decision of Administrative Law Judge John F. Curran, Tulsa, Oklahoma,  
issued November 19, 1971, denying the appellant's petition for rehearing.

Affirmed.

Indian Probate: Appeal: Dismissal

A petition for rehearing which alleges newly discovered evidence as a basis for a rehearing and fails to set out any evidence or any other grounds which would require a rehearing does not meet the requirements of 43 CFR § 4.241 and an appeal from the denial of the petitioned rehearing will be dismissed.

Indian Probate: Attorneys at Law: Generally

Misstatements of law and an erroneous statutory citation in a brief casts doubt on the merits of the appeal and the professional ability of the attorney who filed the brief.

Indian Probate: Rehearing: Generally

The requirements in 43 CFR § 4.241 that a petition for rehearing must state specifically and concisely the grounds upon which it is based, and shall fully set out any newly discovered evidence are for the purpose of allowing the presiding officer the opportunity to make a judgment as to whether a further hearing is warranted.

Indian Probate: Rehearing: Generally

An order denying a rehearing is proper when the petition for rehearing alleging newly discovered evidence fails to state the alleged newly discovered evidence and fails to state any other grounds which would require a rehearing and, accordingly, an appeal from the denial will be dismissed.

State Law: Applicability to Indian Probate, Testate

The authority of the Secretary of the Interior, under 25 U.S.C. § 373, to approve the will of a deceased Indian when it disposes of trust or restricted property is not subject to state law requirements provided the will is executed in accordance with regulations approved by the Secretary.

APPEARANCES: M. Kirshan Rao, for appellant; Herbert A. Becker, for respondent

OPINION BY MR. HARRIS

The testatrix, Lucy Feathers, a/k/a Grace Medicinebird, Lefthand, Bitner, Ridgby, White Plume or Geary, was an unallotted member of the Arapahoe Tribe on the Cheyenne Arapaho Reservation of Oklahoma. She died testate on December 27, 1968, and her Will disposing of her trust or restricted estate was approved by an order entered by Judge Curran on June 22, 1972. The testatrix's daughter, Anna Lefthand Burns, filed a petition for rehearing on August 20, 1971 the full text of which follows:

I am hereby requesting a rehearing of the will of my Mother, Lucy Feathers, deceased 27 December 1969, and from the ruling of the hearing examiner on 22 June 1971, for the following reasons:

1. I was not represented by legal council and therefore did not understand all the proceedings.
2. I have newly discovered evidence to present at the next hearing. Statement attached.

Two signed statements of identical form were attached to the petition:

The undersigned will appear in behalf of Anna Burns, of Geary, Oklahoma, for the purpose of giving testimony at a hearing of the will of Lucy Feathers, deceased.

In an order dated November 19, 1971, Judge Curran made findings that: the petitioner had appeared and testified in two hearings on this case and appeared to be an intelligent person capable of representing herself; that the petition did not meet the requirements of 43 CFR 4.241(a) on newly discovered evidence; that the petition did not set forth any errors of law or fact. Judge Curran then denied a rehearing.

The Judge who presides over a hearing is in a unique position with respect to evaluating witnesses and their testimony, since only he can observe their manner and demeanor as they testify. In this probate proceeding there were two hearings before a final decision. Examiner Blaine on August 7, 1969, conducted the first, but since he was not available thereafter, Judge Curran conducted a second hearing de novo on February 25, 1971, and entered the decision. Appellant appeared, after notice of hearing, at both hearings. She had ample opportunity to obtain counsel or to register any lack of understanding -- instead she testified fully at both hearings while

representing herself and for these reasons Judge Curran's evaluation of the appellant's ability to understand the proceedings before him will not be disturbed.

Title 43 CFR 4.241 (a) states, in pertinent part:

[a] \* \* \* petition for rehearing \* \* \* must state specifically and concisely the grounds upon which it is based. If the petition is based upon newly-discovered evidence, it shall be accompanied by affidavits of witnesses stating fully what the new testimony is to be. It shall also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision. \* \* \*

The specifications in section 4.241 (a) of 43 CFR are for the purpose of requiring the filing of a petition for rehearing which can serve the same function as a motion for a new trial in court. The requirement that the petitioner specifically state the basis of his request provides the petitioner with an opportunity to point out to the presiding officer the nature and extent of any error which may have occurred in the trial of a matter at the original hearing. It also permits one who contends he has discovered new evidence to describe that evidence. Compliance with these requirements is necessary so that the presiding officer may make a judgment as to whether there is in fact any material error in the original proceedings and whether such evidence is truly new or relevant and material or of sufficient weight to cause a possible change in the decision previously rendered. Noncompliance with the provisions

of this section subjects the petition to dismissal for that reason alone. Estate of Ralyen or Rabyea Voorhees, 1 IBIA 62 (1971); Estate of Moses Neaman, IA-146 (October 28, 1954).

The petition for rehearing submitted by appellant, when examined in the light of 43 CFR 4.241(a) discloses that it, together with the attached statements, does not conform to the requirements contained in the regulation. The two statements obviously do not set out any newly discovered evidence, or any evidence at all. One of the signers has testified at both previous hearings. The petition itself alleges no impropriety at the two previous hearings, nor even a disagreement with the decision on June 22, 1971. In short, the petition shows no basis for granting a rehearing and Judge Curran's denial of a rehearing is hereby affirmed as proper.

Appellant, by her attorney, M. Kishan Rao, filed a petition on appeal in which it is urged that the testatrix had lost her memory, was at times out of touch with reality, and was incompetent to make a will. The question of testatrix's lack of competence to make a will on these grounds was thoroughly explored at both hearings and included in the decision approving the will was a finding that she was competent to make a will. Since appellant gives no new evidentiary basis for reconsidering that decision, the Judge's order denying a rehearing will be affirmed and the appeal dismissed.

Mr. Rao also filed a brief in the appeal on behalf of his client. In the brief it is stated:

The will of a full blood Indian must be executed under all the formalities and requirements of State Statute Law.

The authority for that statement is given as:

U.S.C.A. Title 25, sec. 383, Page 449, Paragraph Five (5).

The Board takes notice that the brief includes an erroneous citation to an inapplicable statute and a misstatement of law. An examination of 25 U.S.C.A. reveals that page 449 contains no statutory law. Section 383, found on page 488 of 25 U.S.C.A., pertains to the assessment of cost of surveys, plans, and reports against new irrigation projects. We can only assume that the citation intended was to 25 U.S.C.A. § 373 which pertains to wills of Indians disposing of trust or restricted property, but no such language is found in § 373. The misstatement of statute law and erroneous citation of a statute by an attorney in an apparent effort to confuse and distract the judicial process is reprehensible and will not be tolerated. Moreover, it creates a doubt as to the merits of the appeal and the attorney's professional ability.

Misstatements and inaccurate citation aside, Appellant is now for the first time arguing that the testatrix's will was not executed



in accordance with the law of the State of Oklahoma and is therefore invalid. This argument is without merit.

The authority to approve Indian wills which dispose of trust or allotted lands is set out in 25 U.S.C. § 373:

Any person of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior \* \* \*. Act of June 25, 1910, c. 431 § 2, 36 Stat. 856; Act of February 14, 1913, c. 55, 37 Stat. 628.

Since 1910, the Secretary, or his delegate - currently the Administrative Law Judge and this Board - has exercised this authority with the approval of the courts. Bond v. U.S., 181 F. 613 (9th Cir. 1910) Tooahnippah v. Hickel, 397 U.S. 598 (1970).

Since Congress has conferred jurisdiction on the Department of the Interior under 25 U.S.C. § 373 to probate the restricted estates of Indians, states may not interfere in any way with this jurisdiction. Estate of Laverne Wagon, A-24459 (December 17, 1946). An Indian may by will freely dispose of such estates provided his will

is executed in accordance with regulations and approved by the Secretary. Hansen v. Hoffman, et al., 113 F.2d 780 (10th Cir. 1940).

43 CFR Part 4, Subpart D - Special Rules Applicable to Proceedings in Indian Probate, Including Hearings and Appeals, section 4.260(c) provides:

\* \* \* [no] will that is subject to the regulations of this subpart shall be deemed to be revoked by operation of law of any State.

The Will of Lucy Feathers, having been found to be executed in accordance with Departmental regulations and approved by an Administrative Law Judge under the authority of the Secretary as provided in 25 U.S.C. § 373, is not subject to the law of any state.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Examiner's decision denying appellant's petition for rehearing is AFFIRMED.

This decision is final for the Department.

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//original signed  
Daniel Harris, Member

I concur:

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//original signed  
James M. Day, Member